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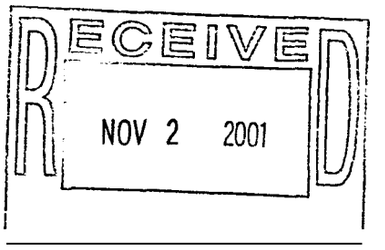
November 2, 2001



VIA HAND DELIVERY

Ms. *Ann* Terbush
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Office of Protected Services Permits (Division F/PR1)
Room 13705
1315 East-West Highway
Silver Spring, MD 21910

Dear Ann:

On behalf of the Alliance of Marine Mammal Parks and Aquariums, I am pleased to submit the attached comments on the proposed rule to amend the regulations for permits to capture or import marine mammals for public display under the Marine Mammal Protection Act published by the National Marine Fisheries Service on July 3, 2001. 66 Fed. Reg. 35209. The Alliance looks forward to continuing to work with NMFS as you consider these and other comments.

With warm personal regards,

Sincerely,

George J. Mannina, Jr.

Enclosure
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COMMENTS BY

THE ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS

ON THE PROPOSED RULE

TO AMEND THE REGULATIONS FOR PERMITS

TO CAPTURE OR IMPORT MARINE MAMMALS

FOR PURPOSES OF PUBLIC DISPLAY

Alliance of Marine Mammal Parks and Aquariums
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November 2, 2001

COMMENTS BY THE ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS ON THE PROPOSED RULE TO AMEND THE REGULATIONS FOR PERMITS TO CAPTURE OR IMPORT MARINE MAMMALS FOR PURPOSES OF PUBLIC DISPLAY

The Alliance of Marine Mammal Parks and Aquariums ("Alliance") submits the following comments on the Proposed Rule to amend the regulations for permits to capture or import marine mammals for purposes of public display under the Marine Mammal Protection Act of 1972 ("Proposed Rule"). 66 Fed. Reg. 35209 (July 3, 2001). These comments are divided into two sections. The first section focuses on general observations and policy issues regarding the Proposed Rule. The second section addresses legal issues associated with the Proposed Rule.

I. OVERVIEW OF THE PROPOSED RULE

A. Public Display Under the Marine Mammal Protection Act.

The Marine Mammal Protection Act ("MMPA" or "Act") was passed in 1972 largely as a result of public concern about the mortalities of marine mammals caused by activities such as sealing, whaling and commercial fishing. At the same time, Congress recognized the invaluable role served by the public display *of* marine mammals. Marine mammal public display facilities are visited by millions of people annually and are essential to carrying out the purposes and policies of the Act. The public display of marine mammals stimulates public interest in, educates about, and creates support for, marine mammal conservation. Congress also recognized the important role of public display institutions as "resources of great international significance, esthetic and

recreational as well as economic." 16 U.S.C. § 1361(6). In fact, Congress has given public display a special status under the Act, making it an exception to the general moratorium on takings. 16 U.S.C. § 1371(a)(1).

These considerations are reflected in the Congressional deliberations on the Act. For example, Senator Hollings stressed that without observing marine mammals in oceanaria the "magnificent interest" in marine mammals will be lost and "none will ever see them and none will care about them and they will be extinct." Ocean Mammal Protection: Hearings Before the Subcommittee on Oceans and Atmosphere of the Senate Committee on Commerce, 92nd Cong., 2d Sess., 266 (1972) ("Senate Hearings"). "If it were not for these organizations and the public exposure you have on these animals in the first place, these matters wouldn't be brought to the attention of the public." Id. at 555.

Senator Gurney lauded the "advent of seaquariums and oceanariums" that have brought home "a much greater awareness of ... ocean mammals." 118 Cong. Rec., S25,291 (daily ed. July 25, 1972). Stressing "the valuable educational service performed by these institutions," Senator Cranston agreed that any moratorium on the take of marine mammals should include an exemption for "reputable zoo and oceanaria." Senate Hearings at 552-553. Senator Chiles stated that he gave:

> strong support towards recognizing the oceanarium-exhibition industry in this legislation. . . . Children by the millions, either on school field trips or accompanying their parents, have become exposed to the wonders of marine animals.

Senate Hearings at 164.

During the consideration of the 1988 amendments to the Act, Congress reaffirmed the importance of public display and scientific research, strongly endorsing continued issuance of permits for these purposes. The House Committee report stressed:

> [E]ducation is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, recreational and economic significance, as well as an important part of the marine ecosystem. It is important, therefore, that public display permits be issued to entities that help inform the public about marine mammals, as well as perform other functions.

H. Rept. No. 970, 100th Cong., 2d Sess., 33-34 (1988).

Similarly, the Senate Committee Report stated:

> [E]ffective public display of marine mammals provides an opportunity to inform the public about the great aesthetic, recreational, and economic significance of marine mammals and their role in the marine ecosystem.

S. Rept. No. 592, 100th Cong., 2d Sess., 29 (1988). The Senate Report also stated:

> The Secretary's determination should be guided by the fact that it is not the intent of this legislation to prohibit the display of marine mammals in zoos, aquaria, or amusement parks that comply with applicable regulations and standards. The Committee recognizes that the recreational experience is an important component of public display and that public display has served a useful educational purpose, exposing tens of millions of people to marine mammals and thereby contributing to the awareness and commitment of the general public to protection of marine mammals and their environment.

Id.

In 1994, when Congress again considered amendments to the Act ("1994 Amendments") affecting the public display of marine mammals, Congress again reaffirmed the importance of public display. The Report of the Senate Committee

on Commerce, Science, and Transportation accompanying the legislation which became the 1994 Amendments to the Act stated:

> Dolphins, sea lions, and other marine mammals are popular displays at public zoos and aquariums across the United States. The MMPA recognizes that this display provides an important educational opportunity to inform the public about the esthetic, recreational, and economic significance of marine mammals and their role in the ocean ecosystem.

S. Rept. No. 220, 103rd Cong., 2d Sess., 4 (1994).

The public display provisions which became the text of the 1994 Amendments were developed through a negotiated process and virtually identical texts were added to the underlying House and Senate bills. The Senate text was added via a floor amendment offered by Senator Exon. In support of the amendment, Senator Exon stated:

> In 1992 alone, over 108 million people visited American *zoos* and aquariums. In fact, I can think of no better form of family entertainment and education. Research has shown that wildlife public display programs are not only educational, they enhance public commitment to conservation . . . .
>
> America's public display institutions are playing an absolutely critical role in the conservation of marine mammals and endangered species. They have taken their responsibilities to the public, their animals and future generations very seriously. Self-regulation among America's zoos, aquariums, and marine parks significantly exceeds minimum federal and state standards.

Cong. Rec., S.3302 (daily ed. March 21, 1994). Senator Lott echoed Senator Exon's sentiments stating:

> Public display and scientific research institutions in Mississippi and throughout the United States play an essential role in marine mammal conservation. Over 100 million people annually visit such institutions and learn about the conservation of these magnificent creatures . . . . This

> amendment. . . reaffirms the role of public display in increasing public awareness and understanding about marine mammals.

Id. at S.3300.

Despite strong and consistent Congressional support for public display, the Proposed Rule imposes additional and unnecessary burdens on the public display of marine mammals. The Proposed Rule should be withdrawn, rewritten, and republished for comment. This is particularly true given the history of the Proposed Rule discussed below.

B. History of the Proposed Rule.

On October 14, 1993, the National Marine Fisheries Service ("NMFS") published a proposed rule governing, among other things, public display. 58 Fed. Reg. 53320 (October 14, 1993). At the time the 1993 proposed rule was published, the regulations governing the public display of marine mammals covered five pages in the Code of Federal Regulations. The 1993 proposed rule and preamble comprised 234 pages. According to NMFS, the purposes of the 1993 proposal were to improve permit program efficiency and to establish a clear and simple program governing the public display of marine mammals. Unfortunately, instead of creating a more efficient, streamlined permit system, the 1993 proposed rule erected an unnecessarily complicated regulatory system and placed an unprecedented paperwork burden on marine mammal parks, aquariums and *zoos.*

The Alliance together with the American Zoo and Aquarium Association filed extensive comments on the 1993 proposed rule, providing copies of their comments to Congress.

Consideration of the 1994 Amendments began in the Senate with the introduction of S.1636 on November 8, 1993, a scant three weeks after publication of the 1993 proposed rule. One day later, on November 9, the Senate Committee on Commerce, Science, and Transportation approved the legislation. The Committee Report notes that during the mark-up of S.1636 concerns were raised regarding public display issues. However, because the publication of the NMFS proposal had "provided little time for review, Committee members agreed to address any remaining concerns through an amendment to S.1636 when it is considered by the full Senate." S. Rept. No. 220, 103rd Cong., **2d** Sess., 5-6 (1994). As noted above, the House and Senate developed virtually identical amendments on public display. The Senate version was added by a floor amendment offered by Senator Exon.

In the House, the legislation leading to the 1994 Amendments was styled H.R. 2760. On February 10, 1994, the Subcommittee on Environment and Natural Resources of the House Merchant Marine and Fisheries Committee conducted a hearing to review the provisions of the Act which governed public display, scientific research, and the subsistence use of marine mammals. The Alliance testified at that hearing, providing detailed commentary on the 1993 proposed rule. Based on that hearing, the Committee adopted an amendment to H.R. 2760 as introduced that "clarifies the regulatory authority of NMFS in

relation to captive marine mammals and reduces duplicative permitting requirements." H. Rept. No. 439, 103rd Cong., 2d Sess., 28 (1994). These amendments, like the Senate version, rejected the 1993 NMFS proposal.

As discussed in more detail below, the facts are that Congress was fully aware of the content of the 1993 NMFS proposal and rejected that proposal in favor of the regulatory program contained in the 1994 Amendments. NMFS waited more than seven years after passage of the 1994 Amendments to publish the Proposed Rule. Unfortunately, the Proposed Rule is inconsistent with, and contradicts, the 1994 Amendments, resurrecting many of the same sweeping and costly proposals Congress specifically rejected in 1994.

II. LEGAL ISSUES SURROUNDING THE PROPOSED RULE.

This section of the comments is divided by topical area. Within each topic, the relevant portions of the Proposed Rule are analyzed.

A. Care and Maintenance Standards for Marine Mammals.

Prior to enactment of the 1994 Amendments, Section 104(c)(1) of the Act, provided that any permit issued by the Secretary authorizing the taking or importation of marine mammals for public display "shall specify . . . the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation." 16 U.S.C. § 1374(c)(1) (1993). NMFS relied on the "and after" clause to assert that it had the authority to promulgate and enforce regulations on the transportation, supervision, handling, care, maintenance, and treatment of marine mammals. The Alliance, in its comments on the 1993 proposed rule, and in its testimony to Congress, argued

NMFS' view of the "and after" clause was incorrect and that the authority of the Secretary of Commerce ("Secretary") under Section 104(c)(1) was limited by the terms of Section 104, the purposes of the Act, Congressional intent, and other statutes.

The Alliance argued that absent a taking, the "and after" clause conferred no authority on the Secretary because it was restricted to activities immediately following a taking or importation. The context of the section limited the "and after" authority to events occurring soon after the taking or importation. It was not a grant of eternal authority. The Alliance noted that even the Justice Department had conceded that Section 104(c)(1) only allowed the Secretary to specify methods of supervision, care and transportation that must be observed "during and after the initial taking or importation..." Federal Defendants' Memorandum in Support of Federal Defendants' Motion to Dismiss and in the Alternative Motion for Summary Judgment, Citizens to End Animal Sufferina and Exploitation. Inc., et. al. v. The New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993) (C.A. No. 91-11634 WF), at 12. Indeed, the Plaintiffs in that case had also recognized that the "and after" clause referred only to activities "connected to an initial importation or taking, and would not concern situations that occur years later." Plaintiffs' Memorandum in Support of its Opposition to New England Aquarium's Motion for Summary Judgment and Federal Defendants' Motion to Dismiss and in the Alternative Motion for Summary Judgment, Citizens to End Animal Sufferina & Exploitation v. New Enaland Aquarium, 836 F. Supp. 45 (D. Mass. 1993), at 11.

Congress agreed and decided that NMFS should not be establishing and enforcing marine mammal care and maintenance standards since that job was already being performed by the Agriculture Department's Animal and Plant Health Inspection Service ("APHIS") pursuant to the Animal Welfare Act ("AWA"). To make this policy decision clear, the 1994 Amendments specifically deleted the "and after" clause. The House Committee Report stated that the new language:

> Makes clear that the role of the Secretary of Commerce, or the Secretary of the Interior as appropriate, is limited to determining whether a person seeking a permit to capture a marine mammal from the wild under this paragraph has a program for education, is registered or licensed under the Animal Welfare Act (7 U.S.C. § 2131), and keeps the animals in facilities that are open to the public . . . . The requirement that a person be registered or licensed under the Animal Welfare Act should not be construed as granting the Secretary authority to prescribe regulations governing the care, handling, treatment, or transport of marine mammals. Such regulations are under the authority of the Secretary of Agriculture, as specified in the Animal Welfare Act. [Emphasis added.]

H. Rept. No. 439, 103rd Cong., 2d Sess., 31-32 (1994).

During floor debate on H.R. 2760, Congressman Cunningham stated:

> The amendments regarding public display are intended to establish public policy regarding the regulation of activities affecting marine mammals in zoological settings. Over the past 5 years, there has been much confusion . . . due to overlapping jurisdictions . . . .
>
> In addressing this problem, we in committee were able to reaffirm that the standards for humane handling, care, treatment, and transportation of marine mammals are established under the Animal Welfare Act and are developed and administered exclusively by the Animal and Plant Health Inspection Service of the Department of Agriculture.
>
> This was done to clarify that the National Marine Fisheries Service cannot set its own standards, by regulation or by

> attaching to the permits general or specific conditions relating to captive maintenance, since the National Marine Fisheries Service has no authority to do so under the Animal Welfare Act, and still does not under the reauthorization of the MMPA.

140 Cong. Rec., H. 1604 (daily ed. March 21, 1994).

Senator Exon, when offering the Senate version of the public display provisions of the 1994 Amendments, also recognized the problems created by the 1993 NMFS proposal stating:

> In recent months, the U.S. Department of Agriculture and the U.S. Department of Commerce have been engaged in a jurisdictional tussle, which, if unresolved threatens to significantly complicate zoo and aquarium operations. Unless the Congress acts, there will be confusion, duplication, and added expense for virtually all American zoos and aquariums, . . . The amendment . . . takes a common sense approach and attempts to untangle a complicated knot of regulation and oversight . . . . The amendment will clarify the lines of responsibility between the U.S. Department of Commerce and the U.S. Department of Agriculture. . . .

140 Cong. Rec., S. 3302 (daily ed. March 21, 1994).

Given this clear Congressional purpose, the Preamble to the Proposed Rule admits that NMFS lacks any authority to regulate the care and transportation of marine mammals held for public display. The Preamble states:

> The 1994 amendments remove the authority of NMFS to specify methods of care and transportation of marine mammals held for public display purposes. Public display permits are now required only for the capture or importation of marine mammals, and not for the possession of marine mammals in captivity. Captive care and maintenance of marine mammals held for public display are now under the sole jurisdiction of Animal and Plant Health Inspection Service (APHIS) which administers the Animal Welfare Act (AWA).

> By removing the jurisdiction of NMFS over public display captive animal care, the [1994] amendments eliminated the basis for NMFS requirement that all public display facilities be issued permits before acquiring marine mammals.

66 Fed. Reg. at 35211

Congress clearly and explicitly rejected the 1993 NMFS proposal and specifically amended the Act to accomplish its purpose. Nevertheless, the Proposed Rule attempts to amend the MMPA to provide that no marine mammal may be held at a public display facility unless NMFS finds the facility is in compliance with the AWA and APHIS' care and maintenance regulations. Proposed § 216.43(b)(3)(ii). This is clearly contrary to the 1994 Amendments and to Congressional intent limiting NMFS' authority and vesting APHIS with sole responsibility for establishing and enforcing care and maintenance standards for marine mammals. indeed, Congressman Cunningham explicitly noted that the AWA is "administered exclusively" by APHIS and that NMFS has "no authority" under the AWA. 140 Cong. Rec., H.1604 (daily ed. March 21, 1994). Thus, NMFS has no authority to assert for itself the power to determine if a display facility is in compliance with regulations promulgated under the AWA. As Congressman Cunningham stated:

> the only determination that NMFS can make, from the perspective of captive maintenance, is whether the individual or entity has an APHIS license or registration.

Id. The 1994 Amendments clearly provided that the Secretary's authority over the care and maintenance of marine mammals for purposes of public display "is limited to" a determination by the Secretary that the applicant is registered or licensed under the AWA. H. Rept. No. 439, 103rd Cong., 2d Sess., 31 (1994).

Therefore, the language in Proposed § 216.43(b)(3)(ii) requiring a determination by NMFS that public display facilities are in compliance with APHIS' standards is contrary to the Act and must be deleted.[1]

Although NMFS may state it has no intent to assert the authority to enforce the AWA, the Proposed Rule belies any such statement. That NMFS is attempting to claim a power which Congress has specifically denied to it is made clear by § 216.43(a)(4) of the Proposed Rule. That section, titled "Right of Inspection," states that to facilitate compliance with the Proposed Rule, any person holding marine mammals "shall allow" any designated employee of the National Oceanic and Atmospheric Administration ("NOAA") to examine any marine mammal, to inspect all facilities and operations which support any marine mammal held for public display, and to review and copy all records concerning any marine mammal held for public display. Proposed § 216.43(a)(4). This section of the Proposed Rule goes on to state that any person holding marine mammals "shall cooperate" with any such inspection and "shall provide any other relevant information requested." Proposed § 216.43(a)(4)(ii). These provisions of the Proposed Rule clearly contravene the 1994 Amendments. Moreover, it is unclear how NMFS can assert the authority to inspect for AWA compliance when

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[1] The clause to be deleted reads "and comply with the applicable Animal and Plant Health Inspection Service (APHIS) standards at 9 C.F.R. subpart E. . . ."

Further reflecting Congressional intent to limit NMFS' authority was the fact that the 1994 Amendments also provided that any person authorized to hold marine mammals because shall have "the right, without obtaining any additional permit or authorization under this Act" to **(1)** import, purchase, offer to purchase, possess, or transport a marine mammal and (2) sell, export, or transfer possession **of** the marine mammal to any person that meets the statutory standards. 16 U.S.C. §§ 1374(c)(2)(B) and (c)(8). Those portions **of** the Proposed Rule providing that no transfer or transport of marine mammals can occur unless NMFS determines the facility is in

the AWA vests with APHIS the sole authority to enforce the marine mammal care and maintenance standards promulgated pursuant to the AWA. See 7 U.S.C. § 2146.

In addition to these statutory issues, the provisions of the Proposed Rule present significant policy issues. For example, how is NMFS to carry out its newly asserted authority? One can hear NMFS arguing that the only way for it to carry out its newly minted regulatory responsibility is to hire independent NMFS inspectors. From where is NMFS to find these inspectors? In an era of increasingly restricted budgets, is NMFS to be hiring its own corps of inspectors to duplicate the APHIS enforcement program? Not only does this raise important budgetary issues, but it also raises the public policy question of why two agencies should be enforcing the same statute.

Moreover, the Proposed Rule raises legal and constitutional issues relating to double jeopardy. Assume a trained and experienced APHIS inspector finds a facility in compliance with the APHIS regulations. But what happens if a NMFS inspectors finds that the facility is not in compliance with APHIS' regulations? This creates the situation in which the agency charged by Congress to enforce the AWA has found that the law ***is*** being complied with but another agency with no statutory to enforce the law finds to the contrary. Which decision prevails? Unfortunately, under the Proposed Rule, NMFS could find that the facility is in violation of APHIS' regulations and determine that the facility is no longer allowed to retain marine mammals for public display. One can only

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compliance with APHIS standards should also be deleted. See **Proposed §§ 216.43(d), (e) and** (f).

imagine the spectacle of a judicial proceeding in which the Justice Department attempts to defend such a decision by its client, NMFS, while the facility calls as its star witness another Justice Department client, APHIS, which says the facility is, in fact, in compliance with APHIS' regulations.

The Proposed Rule then proceeds to compound all of the preceding problems by proposing that "any person" designated by NMFS shall be allowed to inspect any marine mammal held for public display, to inspect any public display facility and its operations, and to review and copy all records concerning any marine mammal held for public display. Proposed § 216.43(a)(4)(i). In other words, NMFS is reserving to itself the authority to appoint "any person" to enforce the AWA. Perhaps NMFS' answer to the question of whether it will be able to secure sufficient appropriations to create a NMFS inspector corps *is* the proposal to allow NMFS to designate any member of the public as an APHIS inspector. But nowhere in the MMPA or in the AWA is there authority for private persons to exercise federal enforcement responsibilities. Not only is this abominable public policy, but it raises extraordinarily important privacy issues which will lead to significant litigation.

It is one thing for agency employees to have access to a permit holder's records, etc. in the course of performing their official responsibilities. It is entirely different for NMFS to require the permit holder to make all of its records, animals, and facilities available for inspection to any member of the public whom NMFS deputizes. The Act designates the Secretary to enforce the Act.[2] The Act does

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2 The Act also allows the Secretary to designate "officers and employees of any state or any possession of the United States" to enforce the Act. 16 U.S.C. § 1377(a) and **(b).**

not authorize the Secretary to appoint any member of the public to review the permit holder's records or to "inspect" the permit holder's animals, facilities, etc. The Act is specific in its limitation. Proposed § 216.43(a)(4) exceeds that limitation and should be deleted.

In this regard, it is significant that § 216.38(c)(16) of the NMFS 1993 proposal also required that a permit holder "allow any person designated by NMFS to inspect or observe the permit holder's records, facilities, protected species, protected species parts, and activities . . . ." Congress rejected this entire concept in 1994 and the effort in the Proposed Rule to resurrect this rejected requirement should again be rejected.

That the language in Proposed § 216.43(b)(3)(ii) requiring compliance with APHIS' regulations and the inspection provisions of Proposed § 216.43(a)(4) exceed NMFS' statutory authority and must be deleted is also made clear by other portions of the 1994 Amendments.

Prior to the 1994 Amendments, the prohibitions section of the Act made it unlawful for any person to use any place under the jurisdiction of the United States "for any purpose in any way connected with the taking" of a marine mammal except as permitted by the Secretary. 16 U.S.C. § 1372(a)(2)(B) (1993). In its 1993 proposal, NMFS had cited the quoted clause as authority for NMFS to establish and enforce permit requirements relating to the care and maintenance of marine mammals. As part of its decision to prevent NMFS from establishing and enforcing care and maintenance standards Congress deleted the clause quoted above.

As the statement by Congressman Cunningham made clear:

> this amendment clarifies that the Act's prohibition with regard to the "take" of marine mammals refers to the collection of marine mammals from the wild. After a marine mammal is lawfully collected; for example, under a section 104 permit, the Secretary does not have the authority to regulate the subsequent captive maintenance of the animal.

140 Cong. Rec., H.1604 (daily ed. March 21, 1994).

The legislative history of the MMPA and the definition of the term "take" makes it clear that Congress acted correctly in restricting NMFS by amending the Act's prohibition section to return the concept of "taking" to its original purpose i.e., to regulate the "taking" of animals from the wild, not to regulate animals in public display facilities. In fact, a review of Congressional intent in defining "take" shows that NMFS' authority under the MMPA cannot extend to the care and maintenance of marine mammals at public display facilities.

The term "take" was intended to, and does, limit NMFS' authority to the removal of animals from the wild. The only court which has considered the issue of whether the definition of "take" includes the captive maintenance of animals was Miraae Resorts, Inc. v. Franklin, No. 92-759, (D. Nev. Nov. 24, 1993), held:

> [T]his Court finds Defendants' proffered definition to be an unacceptable construction of Congress's intended meaning of the term. Defendants' position that their regulating authority covers the purchase, transportation and continuous care of previously captured dolphins handled by exhibitors is untenable.... Defendants admit that since the time the MMPA was enacted in 1972 and until 1991, they interpreted the MMPA to reflect the authorization of permits for the taking of marine mammals from the wild only. [Footnote omitted.] In 1991, however, Defendants' statutory interpretation changed. Suddenly, Defendants' interpretation of the word "take" changed to include captive marine mammals and pre-Act progeny....

> Further, it is apparent that when Congress enacted the MMPA, it intended the Departments of Commerce and Interior, and their agencies, to promulgate regulations that would apply to marine mammals found in their natural wild state. The MMPA's Congressional Findings and Declaration of Policy, codified at 16 U.S.C. 1361, as well as legislative history of the MMPA, support this conclusion....
>
> In sum, the Court finds that the term "take," used in MMPA § 1374(c)(1) is to be construed as taking a marine mammal from its natural setting.

Slip Opinion at 9-11 and 14.

That the term "take" is so limited is readily apparent from the fact that the MMPA was enacted to protect wild marine mammal populations and their natural habitat. Congress was concerned with the large number of marine mammals being taken from the wild because of human activities, particularly the mass killings of dolphins and porpoise by the commercial fishing industry. Earth Island Institute v. Mosbacher, 929 F.2d 1449, 1450 (9th Cir. 1991). To reduce this mass taking of marine mammals, Congress passed the Act. See American Tuna Boat Association v. Baldridae, 738 F.2d 1013, 1014 (9th Cir. 1984); Committee for Humane Leaislation, Inc. v. Richardson, 414 F. Supp. 297, 300 (D.D.C. 1976), aff'd 540 F.2d 1141 (1976). The Act's declaration of policy evidences this purpose:

> (1) Certain species and population stocks of marine mammals are, or may be in danger of extinction or depletion as a result of man's activities;
>
> (2) Such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element of the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.... In particular, efforts should be

made to protect the rookeries, mating grounds and areas of similar significance for each species of marine mammal from the adverse effect of man's actions....

(6) [I]t is the sense of the Congress ... that the primary objective of [marine mammal] management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.

16 U.S.C. § 1361.

To implement its objective of protecting and maintaining wild marine mammal populations, the Act established a moratorium on the further taking of marine mammals unless specifically authorized by the Secretary. 16 U.S.C. § 1371(a).

The legislative history from 1972 when the MMPA was passed confirms that Congressional intent was to protect marine mammals in the wild. The House Committee Report stated:

> H.R. 10420 takes the strong position that marine mammals and the ecosystems upon which they depend for survival require additional protection from man's activities.

H. Rept. No. 707, 92nd Cong., 1st Sess., 12 (1972). Significantly, the House Report also indicates Congressional intent with respect to the word "take."

Each time the word "take" is used in the House Report, the focus is on taking from the wild. For example, after finding that recent history demonstrates the impact of man's activities on marine mammals, (i.e., "they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other indignities"), the Report states that marine mammals and the

marine ecosystems upon which they depend require additional protection. Id. at 12.

The Committee Report indicates that the most pervasive and threatening problem confronting marine mammals is environmental degradation. The Report then identifies man's increased "take" of fish on which marine mammals depend and the pollution caused by ocean dumping as among the principal environmental problems. The Report also mentions the impact of motor boats on manatees and sea otters. Id. at 15. Immediately thereafter the Report states:

> When to these hazards there is added the additional stress of deliberate taking, it becomes clear that marine mammals need protection.

Id.

The Report bemoans the fact that blue and humpback whales have not responded to the "ban on their taking." Id. Similarly, the House Report notes that the United States, Japan, Canada and Russia developed a treaty to "regulate the taking of fur seals" but that the fur seal herd is not growing as fast as it should be given the current permitted "level of taking." Id. at 16. With respect to walrus, the Report notes there are no hard figures on the size of the herd or the "extent of native taking." Id. at 16. Sea otters were found to be beginning to recover from having been hunted almost to the point of extinction and the Committee Report argues that the need for more "adequate protection" is pressing. Id. at 17. For polar bears, the Committee Report points out the decline in numbers caused by increased hunting activities. Id. at 16.

The House Report clearly documents that the problem the Act was intended to address was the impact of man's activities on marine mammals in the wild. Having identified these problems, the Report describes how the bill will help marine mammals. The Report states that before any marine mammal may be "taken" the Secretary must "establish general limitations on the taking" and show that such taking "will not work to the disadvantage of the species or stock of animals involved." Id. at 18. A careful reading of the Report thus reveals that every time the word "take" is used it is in the context of addressing problems in the wild.

The Senate Committee Report from 1972 parallels the House Report, again demonstrating that the issues the Committee sought to address were the problems confronting marine mammals in the wild. The Report indicates the method to address these problems was to restrict the "taking" of animals in the wild.

The Senate Report begins with a statement that "man's dealings with marine mammals have in many areas resulted in over-utilization of this precious natural resource." S. Rept. No. 863, 92nd Cong., 2d Sess., 1-2 (1972). Like its House counterpart, the Senate Committee Report proceeds to discuss the specific problems with individual species of marine mammals that the bill seeks to solve.

The Senate Report notes that the great whales have dwindled to the edge of extinction and "are still being hunted." Id. at 2. The Report finds that while few porpoises and dolphins are being "taken deliberately at this time" hundreds of

thousands are killed incidental to commercial fishing operations. Id. at 2. The Report cites as a positive development that the International Commission on the Northwest Atlantic Fisheries had "reduced by nearly one-half the allowed taking of the harp seal" but finds additional protections are needed to further reduce the "killing" of these animals. Id. at 2. For walruses, the Committee Report finds there is no current international agreement "on the taking of walrus" and that Russian vessels "allegedly have been seen killing" these mammals on pack ice. Id. at 3. The Committee Report notes there is an international treaty regulating the "taking of fur seals" which has restricted the number of animals killed. However, that treaty provides seals "may be taken only in their rookeries." Id. at 5. The Committee Report notes that the central problem confronting polar bears is increased hunting while the principal problems faced by sea otters and manatees is environmental pollution and increased vessel traffic. Id. at **4.**

As with the House Report, all the problems identified by the Senate Report as requiring passage of the Act relate to problems confronted by these animals in the wild. In fact, the Senate Report stated the problem before the Committee as follows:

> The basic issue for the Committee is whether to ban outright the killing of any marine mammal under the jurisdiction of the United States, or whether the government should continue to allow supervised and restricted taking *of* certain mammals. No doubt, a sizable segment of public opinion in the United States opposes the indiscriminate slaughter of marine mammals. But a strong body of evidence was presented to the committee that total and complete protection without scientific management is not necessarily the best answer to solving the problems of marine mammals.

Id. at 5. Clearly, the issue was killing in the wild and the Committee rejected a complete ban on their "taking."

A careful reading of the 1972 Senate Committee Report, like a careful reading of the House Report, also documents that every time the word "take" is used it is in the context of addressing problems in the wild. Thus, the Act's purposes and the Committee Reports make it clear that the singular purpose of the statutory scheme was to protect the marine ecosystem and the marine mammals which are part of that environment. The intent of the Congress in regulating the "take" of marine mammals must be interpreted in light of this statutory purpose. See Offshore & Logistics, Inc. v. Tallentire, 477 U.S. 207, 220-221, 106 S. Ct. 2485 (1986) (meaning of language shown by purpose of Act).

Congress' view of the purpose of the Act was reflected again in the House Report on the 1981 Amendments to the Act. That Report stated:

> The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at healthy population levels. In passing the Act, Congress responded to the growing concern about the decline of certain species and recognized the important role that marine mammals play in the ecosystem as well as their economic, aesthetic and recreational value.

H. Rept. No. 228, 97th Cong., 1st Sess., 11 (1981).[3] The 1981 amendments to the Act are also important because they further demonstrate that the term "take"

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[3] Similar language confirming the purpose of the MMPA is also found in Committee reports of subsequent amendments to the MMPA. See e.g., H. Rept. No. 758, 98th Cong., 2d Sess., 4 (1984) ("The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at healthy population levels. In passing the Act, Congress responded to the growing concern about the decline of certain species. . . ."); H. Rept. No. 970, 100th Cong., 2d Sess., 14 (1988); S. Rept.

applies to activities in the wild and that NMFS has no authority over animals legally removed from the wild.

This was also demonstrated in the Committee Report accompanying the 1988 amendments to the **MMPA.** There, it is stated that marine mammal populations "play an important role in marine ecosystems" and the **MMPA** was enacted "to restore those populations" adversely affected by man's activity. The central feature of the Act to accomplish this purpose was a "moratorium on the taking" of marine mammals. S. Rept. 592, 100th Cong., 2d Sess., 2 (1988). Clearly, the concept of a "take" applied to activities in the wild.

As originally enacted in 1972, Section 102(a)(4) made it unlawful:

> for any person, with respect to any marine mammal taken in violation of this title –
>
> **(A)** to possess any such mammal; or
>
> (B) to transport, sell, or offer for sale any such mammal.

P.L. 92-522, Section 102(a)(3), 86 Stat. 1027 (1972).

Not only did Congress separate the prohibition against taking from the prohibition on the possession, transfer, and transportation of marine mammals,. but Congress also plainly stated that the possession, transfer and transport of animals were activities which occurred after a taking. **NMFS** did not have the authority to regulate post-taking activities if the animal had been legally taken.

No. 592, 100th Cong., 2d Sess., 2 (1988); H. Rept. No. 579 (Part 1), 101st Cong., 2d Sess., 7 (1992); H. Rept. No. **746 (Part 2), 102nd Cong., 2d Sess., 2 (1992); H. Rept. No. 439, 103rd Cong., 2d Sess., 22 (1994); S. Rept. No. 220, 103rd Cong., 2d Sess., 1-2** (1994).

After passage of the Act, serious enforcement problems arose when Alaskan natives, for whom the Act provided an exemption for subsistence takings, unlawfully killed marine mammals and sold their parts in commerce. This practice rendered enforcement against individuals who sold marine mammal parts "taken in violation" of the Act practically impossible because NMFS agents could not distinguish between parts "taken in violation" of the Act and those which were not.4 See Abdo, 6 O.H.A. at 149-150 and 153, 4 O.R.W. 321 (1985).

In 1981, Congress amended Section 102 solely in response to this enforcement problem. Congressional intent was fully explained in the House Committee Report which stated:

> Section 102 as currently written makes the possession, transport, or sale, etc. of a marine mammal or its parts and products illegal only if the marine mammal was taken illegally. This has presented enforcement difficulties in the context of the taking for subsistence purposes where the taking itself is legal while the subsequent use of the marine mammal is in violation of the Act. H.R. 4084 makes it clear that the Secretary need not prove that the taking was illegal in order to proceed against individuals who are otherwise in violation of the Act. The Committee does not view this language as a new provision but rather as a clarification of what Congress always intended.... This provision is not intended to effect the transportation of legally taken marine mammals from the high seas into the territorial sea.

H. Rept. No. 228, 97th Cong., 1st Sess., 21 (1981).

This legislative history renders the distinction between taking and post-taking activities crystal clear. The legislative history also makes it clear that Section 102(a)(4) was not intended to serve as a "new provision but rather as a

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4 **The Act allows Alaskan natives to take marine mammals for subsistence purposes or for the purpose of creating and selling authentic native articles of handicraft or clothing. 16 U.S.C. § 1371(b).**

clarification of what Congress always intended" Section 102(a)(4) to be - to wit - an aid in enforcement against illegal takings that "is not intended to affect the transportation of legally taken marine mammals . . . ." Id.

For twenty years, NMFS' interpretation of the term "take" comported with the statutory scheme that the purpose of the statute was to protect wild populations of marine mammals. When NMFS adopted its first regulations to implement the Act in 1974, the regulations defined "take" to include "the restraint or detention of a marine mammal, no matter how temporary." In that same year, a memorandum by the Office of General Counsel concluded:

> The purpose of the Act is to protect mammals in the marine ecosystem in which they are found, not mammals born in captivity. To consider the handling of offspring in captivity a "taking" is not consistent with that purpose. Therefore, no permit is required for the offspring.

Memorandum to James W. Brennan, Deputy General Counsel, National Marine Fisheries Service, from Mary W. Anderson, Office of the General Counsel, August 26, 1974. The contemporaneous interpretation of the term "take" by NMFS that accompanied the promulgation of the first regulations was that "take" is limited to activities involving marine mammals in the wild. Consequently, the regulatory definition of "take" which included the "detention" of marine mammals was limited to the detention of marine mammals in the wild.

In 1975, the Chief Counsel for Living Marine Resources, NOAA, endorsed and forwarded a memo to the NMFS Law Enforcement Division, addressing the same issue. The cover memorandum from the Chief Counsel stated:

> By this memorandum, the attached memorandum becomes the official position of this office.

Memorandum to Morris M. Pallozzi, Chief, Law Enforcement Division, from Herbert L. Blatt, Chief Counsel for Living Marine Resources, NOAA, dated September 18,1975. The memorandum which was attached, like the 1974 memorandum, concluded that a "take" is limited to activities affecting marine mammals in the wild. Thus, the "official position" of NMFS as reflected in the underlying memorandum was that:

> The Act specifically requires a permit for the taking of a marine mammal subsequent to the effective date of the Act - 16 U.S.C. 1372. However, nowhere in the Act is there any reference to a permit requirement for the offspring of marine mammals born in captivity.
>
> Therefore, if a permit is to be required, such a requirement would result from construing the term "taking" as including the care and maintenance of offspring born in captivity....
>
> [T]he term "taking," as defined by the Act and as stated in its legislative history, connotes affirmative action which adversely affects the marine mammal population.
>
> Certainly, the birth of an offspring does not involve affirmative action by any individual. The care and maintenance of the offspring does require affirmative action. However, care and maintenance does not directly adversely affect the marine mammal population. Therefore, no separate permit requirement has been imposed on . the care and maintenance of offspring born in captivity.

Memorandum to Herbert L. Blatt, Chief Counsel for Living Marine Resources, NOAA, from Gregory R. McConnell, Law Clerk, NOAA, dated August 18, 1975, at 2-3. Clearly, NMFS considered the term "take" related exclusively to activities occurring in the wild. The term "take" did not, and does not, include the maintenance of animals in captivity.

The Supreme Court has repeatedly held that an agency's contemporaneous interpretation of a statute is particularly important because it is rendered by individuals responsible for setting the machinery in motion and making the statute work. The Court has specifically recognized that an interpretation, like the Proposed Rule, rendered several years after the enactment of the statute that conflicts with the agency's contemporaneous interpretation is highly suspect. See Watt v. Alaska, 451 U.S. 259, 273, 101 S. Ct. 1673 (1981).

That NMFS' contemporaneous interpretation of the statute continued to be the agency's position until the 1993 proposed rule is reflected in the agency's annual reports to Congress. In its 1981 Report to Congress NMFS stated:

> The Act allows marine mammals to be used for scientific research and public display. This use, however, is controlled by permit, Letter of Agreement, or other specific authorization. Letters of Agreement may be used only for animals already in captivity. . . . Since no taking is involved, most agreements are handled at the Regional Level.

U.S. Department of Commerce, Marine Mammal Protection Act Annual Report 1980/1981, (1981), at 7.

In its 1982 Report to Congress where NMFS discussed the use of Letters of Agreement, NMFS stated:

> These agreements may be used for animals already in captivity and usually involve placing rehabilitated beached or stranded animals into a suitable public display facility. Since no taking is involved, most Agreements are handled at the Regional level.

U.S. Department of Commerce, Marine Mammal Protection Act of 1972 Annual Report 1981/1982, (1982), at 15.

Similarly, in its 1983 Report to Congress, NMFS again explained that a permit is not required to transport a beached or stranded animal which has already removed itself from the wild because there is no taking involved in such a transport. NMFS told Congress:

> Letters of Agreement were developed as an easier alternative to permits since no actual taking is involved.

U.S. Department of Commerce, Marine Mammal Protection Act of 1972 Annual Report 1982/1983, (1983), at 11.

Further, in its 1989 Discussion Paper on Public Display Permits, NMFS explained that a permit is not required for a beached or stranded marine mammal if such an animal has already removed itself from the wild. NMFS stated that permits are not necessary for the permanent care of beached or stranded animals because:

> The position has been held that permits were not required under these circumstances since a taking of the MMPA had not occurred. The animals were removed from the wild by a stranding event.

NMFS, Permit Policies and Procedures for Scientific Research and Public Display Under the Marine Mammal Protection Act and the Endangered Species Act, a Discussion Paper, March, 1989, at 65.

In a 1991 clarification of agency policy, NMFS stated the statutory exemption for animals in captivity before the Act's effective date applies to:

> those marine mammals "taken" (e.g., captured from the wild) prior to December 21, 1972 . . . .

56 Fed. Reg. 43887,43888 (1991).

Another manifestation of the fact that a "taking" is different from activities including captive animals such as the transfer of such animals is the fact that NMFS and the Fish and Wildlife Service ("FWS") enforce violations for unlawful sales, purchases and transportation differently than they enforce violations for takings under the Act and under other fish and wildlife conservation statutes which prohibit the taking of animals.[5] Thus, in Abdo, 6 O.H.A. 146, 4 O.R.W. 321 (1985), a civil penalty proceeding was brought under the MMPA for the illegal sale of walrus tusks purchased from Alaskan natives. No separate count was brought for an illegal taking. In United States v. Giastead, 528 F.2d 314 (8th Cir. 1976), and Hector Cruz, 4 O.R.W. 887 (1987), civil penalties were imposed for the sale of protected species with no separate count for an illegal taking. In United States v. Dion, 476 U.S. 734, 106 S. Ct. 2216 (1986), a conviction was obtained on two separate counts under the BGEPA and the MBTA, one for the shooting, i.e., taking of bald eagles, and the second for the subsequent sale of parts.

In each case, NMFS and FWS proceeded against violations for sales as sales, and not as takings. No case has been found where NMFS or FWS has treated an unlawful sale, purchase, transfer or transportation as an illegal taking in an enforcement action. If the term "take" included purchase, sale, transfer and

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5 **The definition of "take" in these statutes is either identical or almost identical to the definition of "take" in the MMPA. See Bald and Golden Eagle Protection Act, 16 U.S.C.**

transportation, the agencies enforcing the law would not treat these activities differently in enforcement actions. The agency would also charge people guilty of an illegal purchase, sale, transfer or transport with an illegal take.

The clear language of the statute, the legislative intent, and NMFS' own contemporaneous and consistent subsequent interpretations of the meaning of "take" all demonstrate that the term "take" does not include activities occurring once the marine mammal is removed from the wild. NMFS cannot rely on this definition for any authority to regulate the care and maintenance of marine mammals.

In conclusion, it is clear that there is no statutory or other basis for those portions of the Proposed Rule giving NMFS the authority to determine whether APHIS, care and maintenance standards are complied with or to enforce the AWA through inspection or record reviews by NOAA employees or by persons designated by NOAA.

B. Export of Marine Mammals.

Prior to enactment of the 1994 Amendments, NMFS would not allow the export of marine mammals from the United States unless the Government of the nation in which the receiving facility was located provided NMFS with a letter agreeing to give comity to NMFS' regulations. During Congressional consideration of legislation which became the 1994 Amendments, the question arose regarding what limitations, if any, should be placed upon the export of marine mammals from the United States. The result was clear. The Act was

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§ 668 ("BGEPA); Endangered Species Act, 16 U.S.C. § 1531 ("ESA"); Migratory Bird Treaty Act, 16 U.S.C. § 703 ("MBTA"); Fur **Seal Act, 16 U.S.C. § 1151 ("FSA").**

amended to provide that a person holding marine mammals for public display could export those marine mammals without further authorization from NMFS. 16 U.S.C. §§ 1374(c)(2)(B) and (c)(8)(B). However, Congress also provided marine mammals can only be exported for public display to a receiving facility that meets standards comparable to those set forth at 16 **U.S.C.** § 1374(c)(2)(A). 16 U.S.C. § 1374(c)(9). Those standards are that the facility (1) offer a program for education or conservation purposes based upon professionally recognized standards of the public display community, (2) is registered or holds a license under the Animal Welfare Act, and (3) is open to the public on a regularly scheduled basis with access not limited other than by the charging of an admission fee. 16 U.S.C. § 1374(c)(2)(A).

The provisions of the Proposed Rule relating to the export of marine mammals for public display are contrary to the Act and to Congressional intent. Although the Act states that exports may occur without additional authorization from NMFS, the Proposed Rule requires an additional authorization, i.e., a letter of comity. Proposed § 216.43(f)(4). Further, the Proposed Rule amends the MMPA by replacing the Act's comparability standard with an absolute requirement that the foreign facility "must meet the public display criteria at Sec. 216.43(b)(3)(i)-(iii) . . . ." [Emphasis added.] Proposed § 216.43(f)(2). The intent to amend the MMPA to delete the statutory comparability requirement is made crystal clear in the Preamble to the Proposed Rule.

The Preamble states that NMFS intends to use comity agreements with foreign nations to "ensure" that the foreign receiving facility "must meet" NMFS'

regulatory requirements. 66 Fed. Reg. at 35213. The Preamble goes on to state that all of NMFS' regulatory requirements apply "to holders of animals exported from the United States. . . ." Id. at 35212.

That NMFS has replaced the comparability requirement of the Act with an absolute compliance requirement is nowhere clearer than in the transport provisions of the Proposed Rule. The Proposed Rule states that a facility exporting marine mammals to a foreign facility "must follow the notification requirements at Section 216.43(e)" of the Proposed Rule. Proposed § 216.43(f)(1). The notification requirement in Section 216.43(e) states that the shipping facility "must submit" a certification that the receiving facility "meets the requirements" of Section 216.43(b)(3)(i)-(iii) of the Proposed Rule. Proposed § 216.43(e)(1)(i). Proposed § 216.43(b)(3)(i)-(iii) contains not only the three statutory requirements that a facility offer an education or conservation program, be registered or hold an AWA license, and be open to the public, but it adds the newly minted NMFS requirement that NMFS, in addition to APHIS, determine that a facility is in compliance with APHIS' regulations. Thus, to comply with the Proposed Rule, no foreign facility may receive a marine mammal unless it has a registration or license issued by APHIS and is in full compliance with all of the APHIS regulations.

The clear purpose and intent of the Proposed Rule is that no export can occur until the foreign government agrees to subordinate its national sovereignty to NMFS.

After asserting this broad power, amazingly, the Preamble to the Proposed Rule admits that "NMFS has no jurisdiction in foreign countries . . . ." Id. at 35214. Nevertheless, in a stunning exercise of circular logic NMFS states that it is precisely because the MMPA does not apply outside the United States that NMFS must require that it does apply. Id. at 35213. Simply put, although the MMPA does not apply overseas, NMFS is prohibiting exports unless foreign nations agree to enforce the MMPA overseas. Put another way, NMFS is attempting to amend the Act to convert it into an international treaty binding on the entire world.

There is no legal basis for such a position. The rule is that a Federal statute must not be applied beyond the jurisdiction of the United States unless such extraterritorial reach is expressly provided or clearly implied. E.g., EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Argentina Republic v. Amerada Hess Shipping Corp. et al., 488 U.S. 428,443 (1989); Steele v. Bulova Watch Co., 344 U.S. 280,285 (1952); Folev Brothers v. Filardo, 336 U.S. 281, 285 (1949); Reves-Gaona v. North Carolina Growers Ass'n., 250 F.3d 861,864 (4th Cir. 2001); In Re: Hona Kona and Shanghai Banking Corp., 153 F.2d 991, 995 (9" Cir. 1998); FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1316 (D.C. Cir. 1980); United States v. Mitchell, 553 F.2d 996, 1001-02 (5th Cir. 1977). Congress might determine to extend U.S. jurisdiction, either on the basis *of* citizenship or territorial effects. E.g., Lake Airways Limited v. Sabena. Belaian World Airlines, 731 F.2d 909,921-22 (D.C. Cir. 1984); Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d at 1316. As the

Supreme Court has stressed, "When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." Argentine Republic v. Amerada Hess Shipping Corp., supra, 488 U.S. at 440. However, if Congress intends to apply a law extraterritorially, it must do so explicitly. The question is one of Congressional intent, not authority. E.g., Commodity Futures Tradina Commission v. Nahas, 738 F.2d 487,495 (D.C. Cir. 1984). That intent cannot be found in the MMPA. And, if it could be found, it would extend only to the persons subject to the jurisdiction of the United States, which does not include foreign nations and foreign nationals.

It has been common sense forever and black letter law since 1824 that "[t]he laws of no nation can extend beyond its own territories, except so far as regards its own citizens." The APPOLON. Eden Claim, 22 U.S. 362 (1824). Indeed, in United States v. Mitchell, 553 F.2d 996, 1003, 1005 (5th Cir. 1977), the court examined the structure of the Act including its legislative history and concluded that the Act does not apply within the territory of a foreign sovereign.6

Nevertheless, the Proposed Rule attempts to apply the MMPA within the territory of a foreign sovereign. To justify the Proposed Rule, NMFS will no doubt cite to a December 10, 1996 Opinion of the Office of General Counsel, National Oceanic and Atmospheric Administration ("Opinion"), which incorrectly concluded that the MMPA authorizes letters of comity.

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6 In that case, Mitchell, a U.S. citizen, had been convicted in U.S. court of capturing dolphins within the three mile limit of the Commonwealth of the Bahamas. Mitchell appealed the conviction arguing that "Congress did not intend to exercise its legislative authority to establish subject matter jurisdiction over takings, possessions, and sales of marine mammals in foreign countries." Id. at 1001.

At the outset, the Opinion candidly admits the Act "does not confer U.S. jurisdiction over marine mammals in the territory of other sovereign states."[7] The Opinion also admits that NMFS "does not dispute"[8] ***United States v. Mitchell*** where the court held that the Act does not apply within the territory of a foreign sovereign.[9] Nevertheless, the Opinion concludes that after a marine mammal is exported from the United States, persons receiving that marine mammal have a "continuing obligation"[10] to meet standards "comparable" to those contained in the Act. The Opinion states:

> Any person receiving marine mammals via export must meet standards comparable to the public display requirements at the time of export and must continue to meet these comparable standards; failure to do so authorizes the Secretary [of Commerce] to seize the animals.[11]

The Opinion then defines those "comparable standards" as:

1. offering a program for education or conservation based on professionally recognized standards of the public display community,[12]

2. having care and maintenance standards comparable to those required pursuant to the U.S. Animal Welfare Act,[13]

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7 Opinion at 3.

8 Id. at 3-4.

9 *United States v. Mitchell*, 553 F.2d 996, 1003, 1005 (5th Cir. 1977).

10 Opinion at 7.

11 Id. at 7-8.

12 Id. at 5-6.

13 Id. at 5-6.

3. maintaining facilities that are open to the public on a regularly scheduled basis with access not limited other than by charging an admission fee,[14]

4. ensuring that any facility to which the animals or their progeny are transferred meets conditions 1-3 at the time of the transfer and the second receiving facility must continue to meet conditions 1-3 at all times,[15]

5. providing NMFS with a 15 day advance notice of the transfer of the marine mammal, or its progeny, to another facility,[16]

5. notifying NMFS of the birth of any progeny of the exported animal,[17]

6. maintaining an inventory of marine mammals exported from the U.S. and their progeny,[18] and

7. notifying NMFS of the date of death of any marine mammal exported from the U.S., the date of death of any progeny of the exported animal, and the cause of death when determined.[19]

According to the Opinion, violation of conditions 1-4 "authorizes the Secretary to seize the animals"[20] while failure to comply with conditions 5-8 "would not result in seizure of the animals but in civil or criminal penalties."[21]

At this point, it must be recalled that the Proposed Rule goes far beyond the Opinion because the Proposed Rule replaces the comparability standard

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14 Id. at 5-6.

15 Id. at 5-6.

16 Id. at 8, n. 10.

17 Id. at 8, n. 10.

18 Id. at 8, n. 10.

19 Id. at 8, n. 10.

20 Id. at 7-8.

21 Id. at 8, n. 10.

discussed in the Opinion with an absolute requirement that foreign nations and facilities comply with all of NMFS' regulatory requirements.

Under the precepts set out in the Opinion and in the Proposed Rule, if a marine mammal is to be transferred from a U.S. public display facility to a public display facility in France in 2001, NMFS can block the export unless the foreign facility meets NMFS' regulatory requirements. If the French facility meets the requirements for receiving animals but does not continue to' meet those conditions, the Secretary may "seize the animals."[22] If the French facility continues to meet the regulatory requirements but in 2011 decides to transfer the animal to a public display facility in Spain, the French facility must ensure that the Spanish facility also meets NMFS' regulatory requirements including that NMFS receive a 15 day advance notice of the transport and that both facilities provide NMFS with appropriate inventory reports. And if the animal at the Spanish facility gives birth five years later, the Spanish facility must notify NMFS. And if the progeny is transferred to a public display facility in Germany ten years thereafter, the Spanish facility is to ensure that the German facility meets NMFS' regulatory requirements including that NMFS receive a 15 day advance notice of transport and both facilities provide NMFS with appropriate inventory reports. And if fifteen years later, now forty years after the original 2001 export from the U.S., the marine mammal originally transferred, now in a Spanish facility, dies, NMFS is to receive a notice of that event. And if the progeny, now in Germany, dies in 2061,

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22 Id. at 7-8.

sixty years after the parent left the United States, NMFS is to' receive notification including the cause of death.

Thus, after admitting the Act does not give the U.S. any jurisdiction over marine mammals in foreign nations, the Opinion and the Proposed Rule claim NMFS can still regulate the public display and transfer of marine mammals in foreign nations. To reconcile these opposite and inconsistent statements, the Opinion and the Proposed Rule claim NMFS is not really exercising jurisdiction but is instead requiring that any nation receiving marine mammals exported from the United States sign a letter of comity[23] in which the foreign nation agrees to (1) enforce "requirements equivalent" to the Act[24] and (2) implement any "enforcement decision . . . including . . . seizure" made by NMFS.[25] No matter how NMFS may try to hide what it is doing, the facts are that what NMFS is attempting to do is apply the MMPA in other nations.

In fact, conspicuously absent from the Opinion and the Proposed Rule is any explanatiorrof how the effect of a letter of comity is any different from the proscribed exercise of jurisdiction. For example, how is the requirement that a foreign nation enforce a unilateral NMFS decision to seize marine mammals in that nation anything other than an exercise of U.S. jurisdiction within the territory of another sovereign? NMFS seems to be arguing that if NMFS does not call its actions an assertion of jurisdiction but instead calls its actions comity then a court

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23 Id. at 8.

24 Id. at 3.

25 Id. at 3.

or policy maker will not look behind the name. Further weakening the agency's position is the fact that the Opinion admits (1) the 1994 Amendments to the Act removed the statutory basis **NMFS** had relied on for requiring letters of comity and (2) the Act does not contain explicit authority for comity letters.[26]

Trapped in a web of contradictions, the Opinion persists by claiming that three sections of the Act somehow justify letters of comity. These sections are discussed below.[27]

The Opinion first cites Section 104(c)(9)[28] which states:

> No marine mammal may be exported for the purpose of public display . . . unless the receiving facility meets standards that are comparable to the requirements that a person must meet to receive a permit under this subsection for that purpose.

The requirements that a person must meet to receive a permit to take or import a marine mammal for public display are set forth in Section 104(c)(2)(A), 16 **U.S.C**§ 1374(c)(2)(A), as follows:

> **A** permit may be issued to take or import a marine mammal for the purpose of public display only to a person which the Secretary determines—
>
> **(i)** offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community;
>
> (ii) is registered or holds a license issued under 7 U.S.C. 2131 et seq.; and

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26 **Id.** at **2 and 4.**

27 **Id. at** 7.

28 Id. at 7 **citing 16 U.S.C. § 1374(c)(9).**

(iii) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis and that access to such facilities is not limited or restricted other than by charging of an admission fee.

The Opinion's reliance on Section 104(c)(9) is misplaced. Section 104(c)(9) provides that before an animal leaves the United States there must be a determination that the receiving facility meets standards comparable to the Section 104(c)(2)(A) standards quoted above. Section 104(c)(9) establishes pre-export conditions which apply to the marine mammal while it is within the United States and subject to U.S. jurisdiction. Nowhere in Section 104(c)(9) is there any post-export requirement justifying a letter of comity addressing post-export actions.

Section 104(c)(2)(C), 16 U.S.C. § 1374(c)(2)(C), is the second provision of the Act relied upon by the Opinion[29] to justify letters of comity and the exercise of post-export U.S. jurisdiction. Section 104(c)(2)(C) states:

> A person to which a marine mammal is sold or exported or to which possession of a marine mammal is otherwise transferred under the authority of [Section 104(c)(2)](B) shall have the rights and responsibilities described in [Section 104(c)(2)](B) with respect to the marine mammal without obtaining any additional permit or authorization under this Act. Such responsibilities shall be limited to—
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> (i) for the purpose of public display, the responsibility to meet the requirements of clauses (i), (ii), and (iii) of [Section 104(c)(2)](A)....

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29 Id. at 7.

Section 104(c)(2)(C) is explicit in providing that any person to whom a marine mammal is transferred shall have certain "rights and responsibilities." The rights are those described in Section 104(c)(2)(B).[30] Those rights are to transfer, transport, sell, export, etc. any marine mammal "without obtaining any additional permit or authorization." The Opinion fails to explain how a requirement for a letter of comity is anything other than an additional permit or authorization proscribed by Section 104(c)(2)(C).

Section 104(c)(2)(C) is also explicit in stating that the responsibilities of a person to whom a marine mammal is to be exported "shall be limited" to the requirements of Section 104(c)(2)(A). As noted above, Section 104(c)(2)(A) sets forth the comparable conditions which must exist before the animal is first received at a foreign facility, i.e., before the animal is exported from the United States. These requirements do not address the post-export conditions NMFS seeks to impose via letters of comity.

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30 Section 104(c)(2)(B), 16 U.S.C§ 1374(c)(2)(B), states:

> A permit under this paragraph shall grant to the person to which it is issued the right, without obtaining any additional permit or authorization under this Act, to--
>
> (i) take, import, purchase, offer to purchase, possess, or transport the marine mammal that is the subject of the permit; and
>
> (ii) sell, export, or otherwise transfer possession of the marine mammal, or offer to sell, export or otherwise transfer possession of the marine mammal--
>
> (I) for the purpose of public display, to a person that meets the requirements of clauses (i), (ii) and (iii) of [Section 104(c)(2)](A) . . . .

The third provision of the Act relied on by the Opinion to justify its exercise of jurisdiction through letters of comity is Section 104(c)(2)(D), 16 U.S.C. § 1374(c)(2)(D).[31] That section states that if a person no longer meets the Section 104(c)(2)(A) requirements after receiving a marine mammal, and is not reasonably likely to meet those requirements in the near future, then:

> The Secretary may revoke the permit in accordance with section 104(e), seize the marine mammal, or cooperate with other persons authorized to hold marine mammals under this Act for disposition of the marine mammal. The Secretary may recover from the person expenses incurred by the Secretary for that seizure. [32]

The Opinion claims that the existence of seizure authority indicates that the requirements of Section 104(c)(2)(A) are a "continuing obligation."[33] But if the Act does not confer authority to regulate activities in foreign nations, how can there be a "continuing obligation" applicable outside the territory of the United States. Since the Act does not extend to marine mammals in foreign nations, the "continuing obligation" and the Secretary's seizure authority can only be coextensive with the Secretary's jurisdiction which is within areas subject to U.S. jurisdiction.

Although not relied on as a principal basis of authority, the Opinion finds secondary authority for letters of comity in Section 104(c)(2)(E), 16 U.S.C. § 1374(c)(2)(E), regarding transport notifications; Section 104(c)(8)(B), 16 U.S.C. § 1374(c)(8)(B), regarding notification of the birth, sale, purchase or transport of

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31 Opinion at 7.

32 16 U.S.C. § 1374(c)(2)(D).

33 Opinion at 7.

progeny; and Section 104(c)(10), 16 U.S.C. § 1374(c)(10), regarding the maintenance of a marine mammal inventory.[34] None of these provisions strengthen NMFS' position. Each of these sections apply to only two categories of persons; first, persons to whom "a permit" has been issued under Section 104(c)(2)(A), and second, persons "exercising rights" under Section 104(c)(2)(C). Foreign public display facilities fit into neither category. As to the first category, even NMFS does not argue that foreign public display facilities must apply for and receive a permit from NMFS under the Act before importing a marine mammal from the United States. As to the second category, persons "exercising rights" under the Act, since the Opinion admits the Act does not apply to persons outside the United States, such persons cannot be exercising rights under the Act.

The Opinion also seeks to create the impression that the State Department concurs in the Opinion.[35] Any such implication is wrong. The Opinion characterizes the State Department as stating that when a statute does not give the United States jurisdiction over activities in other nations, the U.S. may need to "seek assurances" of comity from such nations. Asking for an assurance, which is what the State Department suggests, is far different from demanding and insisting upon an assurance, which is what NMFS is doing.

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34 Id. at 8, n. 10.

35 Id. at 4.

Moreover, according to the Opinion, the State Department specifically declined to offer a view on whether NMFS' actions are consistent with the Act.[36]

The Opinion and the Proposed Rule make the remarkable assertion that although the Act does not extend to marine mammals in the territory of other nations, NMFS can nevertheless assert U.S. jurisdiction over such marine mammals by using a device called a letter of comity. NMFS' actions exceed its statutory authority and reliance on the Opinion provides no justification for the Proposed Rule.

Perhaps recognizing the weakness of its position, the Preamble to the Proposed Rule proffers a second justification for letters of comity. There, NMFS asserts that it is "required to maintain an inventory of captive marine mammals" and, therefore, must have letters of comity requiring foreign nations to compel facilities in their nation to provide inventory reports to NMFS. 66 Fed. Reg. at 35213. Although the Act does provide that the Secretary is to establish and maintain an inventory of all marine mammals held pursuant to permits issued under the MMPA and all progeny of such marine mammals, there is no basis for concluding that this inventory requirement applies to animals not held in the United States. Nowhere does the Act state that NMFS is to maintain an inventory of marine mammals and their progeny regardless of whether those animals are found within the United States. As noted above, the courts have held that if Congress intends a provision of law to apply extraterritorially it must say so explicitly. Here, there is no such intent. Even if such intent were present,

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36 Id. at 4.

the U.S. does not have any jurisdiction over foreign citizens in foreign nations and cannot apply the inventory requirement to foreign nationals not subject to the jurisdiction of the United States.

The simple truth is that since everyone, including NMFS, agrees the MMPA does not apply outside the United States, it is hard to see how NMFS reaches the conclusion that NMFS is to apply the MMPA's inventory reporting requirements to foreign citizens.

In addition to the legal issues, there are several practical policy problems associated with the requirement for a letter of comity set forth in the Proposed Rule. The first problem is that NMFS' policy infuriates foreign governments who, not surprisingly, are less than enthusiastic about subordinating their national sovereignty to NMFS' regulations. For example, a letter to NMFS dated May 14, 1996 from the Director of the Department of Agriculture and Fisheries of Bermuda states in response to NMFS' demand for a letter of comity that "[t]he Government of Bermuda does not have the authority to subrogate its regulatory duties over persons in Bermuda to any other Government or Governmental agency. In short, the Government of Bermuda cannot issue a letter of comity to NMFS."

Indeed, recognizing this reality, NMFS often abandons its own policy. Thus, after NMFS successfully offends a foreign nation by demanding that it subordinate its national sovereignty to NMFS, and after forcing U.S. facilities to incur enormous transactional costs, NMFS often settles for a "letter of comity" which does not even comply with its own regulations. In one case, for example,

NMFS deemed a letter from the mayor of a town as an appropriate letter of comity. The Alliance is unaware of any nation in which the mayor of a city has the authority to bind the national government. In another case, the foreign government refused to sign a letter of comity and NMFS accepted a letter from the foreign facility stating it would give comity to NMFS' regulations.

The net result is that the existing policy which NMFS seeks to codify and expand in the Proposed Rule not only is offensive to other nations but it is *so* offensive that NMFS often abandons the policy. Given those realities, why does NMFS persist? The requirement for letters of comity and the requirements that foreign nations absolutely adhere to NMFS' regulations should be stripped from the Proposed Rule.

There are other significant policy reasons for deleting these provisions. First, the Proposed Rule has broad ramifications for marine mammal breeding programs and the exchanges of animals which are necessary for species management internationally. Institutions in foreign nations that object to letters of comity and to U.S. infringement on their sovereignty will be unable to participate in these important programs to the detriment of the animals. These programs will become even more prevalent in the future as the number of offspring increases and the Taxon Advisory Groups make essential determinations regarding genetic diversity within a species.

Second, the Proposed Rule will have an adverse impact on stranded animals. NMFS' letter of comity requirement will limit the availability of housing

for stranded, unreleasable animals for which placement in the U.S. is impossible. Such animals may have to be euthanized because of NMFS' policy.

Third, before issuing CITES permits to export animals, the Fish and Wildlife Service, which administers CITES, requires concurrence by NMFS with respect to CITES listed marine mammal species under NMFS' jurisdiction. NMFS will not provide that concurrence without a letter of comity. The net effect is that persons are precluded from receiving CITES permits because of NMFS' insistence on letters of comity.

Fourth, when NMFS relents and accepts something less than a letter of comity, i.e., accepts a letter from a mayor, it does so only after the U.S. and foreign public display facilities have expended huge amounts of time and money attempting to bridge the gap between NMFS and the foreign government. These excessive transactional costs are wholly unnecessary.

Finally, it should be noted that there is no precedent for letters of comity. No other laws or regulations, for anv other species of wildlife, require foreign facilities to be treated as U.S. facilities following transport, as in the case of NMFS' interim guidelines. Under the Endangered Species Act, once an export permit is issued (based on the adequacy of the facility, expertise of those applying for the permit, and purposes for export) and the transportation has occurred, there is no continuing enforcement over the wildlife in the foreign country even if the animals are endangered or threatened. The same premise applies to CITES. A permit is issued after a facility has been deemed adequate

and the purpose of the export found acceptable to CITES. After shipment to the receiving facility there is no continuing enforcement.

For all of the preceding legal and policy reasons, the export control provisions of the Proposed Rule, including the requirements for letters of comity and adherence to NMFS' regulations, should be deleted from the Proposed Rule.

C. Transfer. Reporting and Related Reauirements.

1. Transfer Reauirements.

In its 1993 proposal, NMFS sought to erect a fairly cumbersome and paper intensive system to regulate the transfer of animals between facilities. The Alliance and other commentors recommended a simpler system. The 1994 Amendments rejected the 1993 NMFS proposal, replacing it with a simpler system in which a person issued a permit to take or import marine mammals for public display shall have the right "without obtaining any additional permit or authorization" to sell, transport, transfer, etc. the marine mammal to persons who meet the MMPA requirements. 16 U.S.C. §§ 1374(c)(2)(B) and (c)(8)(A). The 1994 Amendments also provided that the Secretary must be notified at least 15 days before any sale, transport, etc. 16 U.S.C. §§ 1374(c)(2)(E) and (c)(8)(B). The Proposed Rule ignores this statutorily mandated process and resurrects much of the 1993 NMFS proposal that Congress rejected.

At the outset, recognize just what the Act requires. The Act states:

> No marine mammal. . . may be sold, purchased, exported, or transported unless the Secretary is notified of such action no later than 15 days before such action . . . . The Secretary mav onlv require the notification to include the information required for the inventory established under paragraph (10). [Emphasis added.]

16 U.S.C. § 1374(c)(2)(E).[37] Note two things about this statutory provision. First, the Secretary is to receive one 15 day notice. Second, the Secretary may only require that the notice include information required for the inventory. That information is the name of the marine mammal or its other identification, its sex, its estimated or actual birth date, its date of acquisition, the source from which the marine mammal was acquired, the name of the recipient if the marine mammal is being transferred, and a notation if the animal was acquired as the result of a stranding. 16 U.S.C. § 1374(c)(10).

Juxtapose this simple and direct system with the Proposed Rule. First, the Proposed Rule requires that prior to transport both the shipper and the receiver submit a Marine Mammal Transport Notification ("MMTN"). Each MMTN is to be accompanied by a Marine Mammal Data Sheet ("MMDS") for each animal to be transferred. Proposed § 216.43(e)(1)(i). instead of one form, NMFS initially requires that two MMTN forms be filed, each of which contain identical information, and that two MMDS forms be filed, each of which contain the same information already in the inventory. This continued repetition of information already in the inventory is curious. Why cannot an animal be identified using its Marine Mammal Inventory Identification Number? If that were done, NMFS could simply refer to the information already in the inventory rather than have the same information submitted repeatedly.

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37 The same requirements apply with respect to transfers of progeny. 16 U.S.C. § 1374(c)(8)(B).

The Proposed Rule then adds a requirement nowhere found in the Act that both the shipper and receiver sign a certification stating that the receiving facility not only meets the three statutory standards set forth in Section 104(c)(2)(A), 16 **U.S.C.** § 1374(c)(2)(A), but also meets the Proposed Rule's newly minted condition that the receiving facility is in compliance with APHIS' regulations. These certifications are not required by the MMPA. Moreover, why cannot NMFS rely upon the fact that the receiving facility has already been determined by NMFS to meet the three statutory standards and, assuming for a moment that the newly minted additional requirement is valid, on APHIS' determination that the facility is in compliance with APHIS' regulations.38

Having thus far replaced the statutorily required single notification with four forms containing the same information, and with the certifications discussed above, the Proposed Rule goes on to require that after the transfer is complete the receiver must provide a verification of the transfer and a new MMDS for each marine mammal. Of course, this last MMDS repeats the information already submitted in the two prior MMDSs, each of which repeat the information already contained in the NMFS inventory. Proposed § 216.43(e)(2).

In sum, the Act's requirement for a 15 day notification has been replaced in the Proposed Rule by six forms, three of which repeat the identical information

38 Given that the Proposed Rule prohibits the submission of false information and imposes civil and criminal penalties for such failure, Proposed § 216.13(g), the question arises whether the Proposed Rule's certification requirement imposes an affirmative requirement on the shipping facility to conduct an on-site inspection of the receiving facility so that the shipper can verify that the receiver complies with APHIS' regulations. This not only creates additional and unnecessary transactional costs but it also creates the unusual situation in which APHIS' care and maintenance regulations are now being enforced by (1) APHIS, (2) NMFS, (3) any other person appointed by NMFS, and (4) the shipping facility. Thus under the Proposed Rule, four different

already contained in the inventory, and two of which contain certifications nowhere required by the Act.

There is also no statutory foundation for the requirement in Proposed § 216.43(e)(1)(iii) that NMFS receive notification 15 days in advance of the transport of a marine mammal for a school visit or similar outreach event in which the animal will be removed from the holding facility for more than 12 hours. As set forth in the last sentence of 16 U.S.C § 1374(c)(2)(E), the Secretary may only require that the 15 day notification include information required for the inventory. Here, the transport of an animal for a school visit or outreach event does not involve a change of possession or inventory status and, therefore, does not trigger the 15 day notification requirement.

Similarly, a new 15 day notification is not required if the transport does not occur within 90 days as is required in Proposed § 216.43(e)(1)(v)(A). The Act provides for one 15 day notice. Confirmation of the transport is to be made in an annual inventory update.

Proposed §§ 216.43(e)(1) and (2) should be deleted and replaced by a simple letter notification when possession of an animal is being transferred. Confirmation of the transfer will be made upon an annual review of the inventory report. Moreover, the introductory clause of Proposed § 216.43(e) which states that the right to transfer or transport marine mammals is a "conditional" right should be amended by deleting the word "conditional." The Act states explicitly that a permit granted under the Act "shall grant" to the permit holder "the right,

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entities can be making the determination about APHIS compliance which, as noted above, creates serious public policy and legal issues.

without obtaining any additional permit or authorization" to engage in certain activities including the transfer of possession. This right is not "conditional."

The recommended changes to Proposed §§ 216.43(e)(1) and (2) will also necessitate parallel changes in the structure of Proposed §§ 216.43(d) and (e)(3). Furthermore, Proposed § 216.43(d) should be amended by deleting the reference to "physical location" everywhere it is found. Inclusion of the term "physical location" could mean that the transfer of an animal to a different "physical location" requires a 15 day notice because the term "physical location" is specifically juxtaposed with the term " facility" which implies a distinction between the two. Thus, if the term "physical location" is accorded its ordinary dictionary meaning, it could be interpreted to mean that if a marine mammal is moved 50 feet from one pool to another there is a change in the "physical location" requiring a 15 day notice. Since the transport notification provisions of the Act were designed to advise NMFS of changes of ownership, it is not clear why a change in physical location which does not involve a change of ownership requires any notification, let alone the multiplicity of forms which are required by Proposed § 216.43(e). References to "physical location" in this part of the Proposed Rule should be deleted. A corresponding change should also be made in the definition of "transport" in Proposed § 216.43(a)(v).

A necessary corollary is that no 15 day notice is required when an animal is moved but remains in the care and custody of the same person. The 15 day notice is intended to apply to the situation in which possession *of* a marine mammal is transferred to another person. The Proposed Rule defines this as a

change in custody. Proposed § 216.43(a)(1)(i). Where the animal is under the same person's care and control, and is held under the same APHIS registration and license, there is no transfer requiring a 15 day notice. Indeed, as noted above, the Act states that in a transport notification, NMFS may "only" require information required for the inventory. 16 **U.S.C.** § 1374(c)(2)(E). In the fact pattern described in this paragraph, there is no change in the inventory and, therefore, no 15 day notice is required. The Proposed Rule should be amended to make this clear.

Regarding other transfer notification provisions in the Proposed Rule, the Alliance does support the emergency transport provisions of Proposed § 216.43(e)(3) for the reasons set forth in the Preamble. However, there is no reason that NMFS needs to receive a 15 day notice of the time, date and port of entry of any marine mammal import. Proposed § 216.43(b)(5)(iii). As noted in Proposed § 216.43(b)(5)(iv), marine mammals must be transported in accordance with APHIS' transportation standards. There is nothing for NMFS to do and no reason for this notification. Proposed § 216.43(b)(6)(ii) should also be deleted. That section requires that NMFS receive a notification verifying the import. As noted above, transport verifications should occur in the context of an annual inventory update.

2. Inventory and Other Reporting Reauirements.

Proposed § 216.43(e)(4) proceeds from an incorrect premise. The section begins by stating that "to satisfy the 30 day requirement for reporting births, deaths, transfers or other changes in inventory" holders must submit an MMDS

to NMFS. However, there is no 30 day notice requirement anywhere in the Act except with respect to progeny in which case the Secretary is to receive a notice of birth within 30 days after such birth. 16 **U.S.C. § 1374(c)(8)(B)(i)(I).** The fact that the Act is explicit with respect to one category and silent with respect to the others must be interpreted to mean that the 30 day notice applies only with respect to the one category. Therefore, the multiplicity of 30 day notifications contained in Proposed § 216.43(e)(4) should be deleted except with respect to the birth of progeny within the United States.

Furthermore, the purpose of the marine mammal inventory is to provide a record of animals actually held at public display facilities. Thus, it's only valid purpose can be with respect to living marine mammals. It is neither appropriate nor necessary that the Proposed Rule require facilities to report stillbirths. Such animals will not become part of the inventory of animals at public display facilities. Therefore, the requirement in Proposed § 216.43(e)(4)(vii) for reporting stillbirths should be deleted. The issue regarding stillbirths is with respect to genetics and public display facilities already report stillbirths to persons maintaining these genetic records.

Proposed § 216.43(e)(5) requires public display facilities to verify the accuracy of inventory information upon request by NMFS. If the changes to the Proposed Rule suggested in subpart C of these comments are adopted, NMFS could still use the language of Proposed § 216.43(e)(5) to send facilities continuing and repeated requests for inventory updates, thereby achieving the same regulatory purposes which are inappropriately included in other sections of

the Proposed Rule. Therefore, Proposed § 216.43(e)(5) should be amended to provide for an annual inventory review by the facility.

D. Removal of Animals from the Wild.

The Act prohibits the importation of depleted species. 16 U.S.C. § 1372(b)(3). In establishing standards governing the removal of non-depleted species from the wild, the Proposed Rule creates three categories: (1) non-depleted species for which NMFS has not established a removal quota, (2) non-depleted species for which such a quota has been established, and (3) species proposed to be listed as depleted.

With respect to the first category, existing regulations published on May 10, 1996 provide that to remove an animal from the wild an applicant must demonstrate that the proposed activity "by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock. . . ." 50 C.F.R. 216.34(a)(4). Conspicuously absent from the Proposed Rule is any explanation or justification regarding why existing regulations are inadequate.

Nevertheless, without explanation or justification, the Proposed Rule effectively repeals these provisions, replacing them with a requirement that the applicant prove the taking "will not have, by itself or in combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect" on the species. Proposed § 216.43(b)(3)(v)(B). Unlike the existing regulations which require a showing that the taking is not "likely" to have a significant adverse effect on the species, the Proposed Rule requires proof that

the taking "will not have" such an effect. Requiring proof of a negative essentially forecloses any future removal from the wild for public display.

Compounding the problem, the Proposed Rule not only requires that a negative be proven with respect to "direct" effects but also with respect to what NMFS calls "indirect" effects. Although it is difficult enough to determine what constitutes a "direct effect," the concept of an "indirect effect" is so speculative and all encompassing as to be impossible to define and, therefore, a likely source of new litigation. This provision of the Proposed Rule is virtually identical to that contained in § 216.35(b)(2)(ii) of NMFS' 1993 proposal. Congress rejected that proposal in the 1994 Amendments, a fact implicitly recognized by NMFS itself when NMFS did not attempt to re-propose those standards in 1996. Nevertheless, the Proposed Rule resurrects the 1993 language.

Further compounding the problem, the Proposed Rule next requires that a person proposing to capture animals "demonstrate" that the capture "will present the least practicable effect on wild populations . . . ." Proposed § 216.43(b)(3)(iv). Not only is there enormous subjectivity in determining what constitutes the "least practicable effect," but the Preamble to the Proposed Rule complicates the issue by providing the agency's interpretation of the word "practicable." The Preamble states that to satisfy the "least practicable effect" standard the applicant must prove that the capture will have the "least possible effect." [Emphasis added.] 66 Fed. Reg. at 35212. Not only is the least practicable effect an amorphous concept, but the least "possible" effect is such an absolute standard that it will effectively bar removals from the wild.

Furthermore, while the one regulatory provision requires proof that the removal will have the least possible effect on "populations," the other requires proof that the removal will not have a significant direct or indirect adverse effect on the "species or stock." A population is different from a species or stock. It appears NMFS is reserving the right to apply one standard with respect to "populations" and another standard with respect to the "species or stock thus presenting applicants with a shifting and different target as to what must be proven.

Not only does the Proposed Rule establish virtually impossible to meet standards, but if a person attempts to meet the standards, the Proposed Rule creates still more obstacles. The Proposed Rule appears to allow NMFS to demand that public display facilities undertake extensive, expensive and time consuming research to gather and analyze data. The Proposed Rule is quite specific that NMFS' decision on a proposal to remove animals from the wild is "to be based on the best available information, including information gathered by the applicant." Proposed § 216.43(b)(3)(v)(B). The "including" clause should be amended to make it clear that the clause does not authorize NMFS to require a never ending gathering of new information in order to satisfy whatever information thresholds NMFS may think of. Obviously, NMFS should consider any information which is known to the applicant, but this clause should not be a basis for NMFS to insist upon extensive, if not impossible to meet, scientific research burdens. This section of the Proposed Rule should be amended to

provide that NMFS will make any determination regarding removals from the wild based on the best available existing scientific and commercial information.

In sum, the provisions of the existing regulations should be retained and the provisions in the Proposed Rule should be abandoned.

Where NMFS has established a removal quota, the Proposed Rule requires proof that the removal is consistent with the applicable quota and that the capture will have the least possible effect on wild populations. Proposed §§ 216.43(b)(3)(iv) and (v)(A). The latter requirement is discussed above. The former requirement is difficult to assess because neither the existing regulations nor the Proposed Rule provide a procedure by which NMFS establishes such a quota and so it is impossible to know what standard is being applied. Indeed, this portion of the Proposed Rule may be void for vagueness and should be withdrawn. Any procedure and standard by which NMFS determines quotas should be established pursuant to the Administrative Procedure Act through a proposed and final rulemaking. Moreover, a take for public display should receive preference over all other actions which might result in a removal. Such a policy is fully consistent with the MMPA which grants public display a specific exception from the moratorium on the taking of marine mammals. 16 U.S.C. § 1371(a)(1).

As noted above, the Act prohibits the importation of depleted species. 16 U.S.C. § 1372(b)(3). However, the Proposed Rule attempts to amend the Act by prohibiting the removal from the wild of species "proposed by NMFS to be designated as depleted . . ." Proposed § 216.43(b)(4). This provision is

inconsistent with the Act which only prohibits the importation of depleted species. The Act makes no mention of species which are proposed to be depleted.

In this regard, it is significant that § 216.36(b)(4) of NMFS' 1993 proposal contained language virtually identical to that in the Proposed Rule prohibiting the removal from the wild of species proposed to be designated as depleted. The public display community specifically protested this provision because it was contrary to the Act and because it provided no timeframe within which NMFS must act on any "proposal" to designate a species as depleted. Congress considered the issue and rejected NMFS' proposal. Thus, the House Committee Report notes that the term "depleted" is defined in the Act but the Report makes no reference to giving NMFS the authority to restrict the taking of species which are only proposed for depletion. H. Rept. 439, 103rd Cong., 2d Sess., 22 (1994). Similarly, the Senate Report referenced the procedures by which animals are taken or imported for purposes of public display and nowhere suggested a need to change these provisions to prohibiting the taking of species proposed for depletion. S, Rept. 220, 103rd Cong., 2d Sess., 3 (1994). Even the Endangered Species Act does not have a provision like that which NMFS is attempting to insert into the MMPA. This provision of the Proposed Rule should be deleted.

These are also procedural matters in the Proposed Rule relating to removals from the wild which are of concern. For example, Proposed § 216.43(b)(5)(i) requires 15 days advance notice of the "actual date(s) and location of the capture . . . ." It is impossible to provide the actual location in advance. It is only possible to tell NMFS the general area and this provision

should be understood to require only that. More importantly, there is no need for NMFS to receive a 15 day advance notice of every capture. If NMFS wishes to have an observer present, NMFS should so indicate at the time the permit is granted **so** that appropriate arrangements can be made. Moreover, information about the date and general location of any capture must be treated as confidential by NMFS so as to avoid that information being used to disrupt the permitted activity in ways that will be dangerous to the marine mammals and to the people involved.

E. Miscellaneous Provisions

1. Retention of Non-Releasable Animals.

Proposed § 216.27(c)(4) requires a special exception permit if a beached or stranded animal that has been determined to be non-releasable is to be retained. In the context of a public display facility, NMFS should be confined to making the determinations set forth in 16 **U.S.C.** § 1374(c)(2)(A). The standards relating to granting a permit for removal from the wild are inapplicable because the animal has already removed itself from the wild and cannot be returned.

2. Recall Trainina.

Proposed § 216.43(a)(5) requires NMFS approval for the temporary release of marine mammals from public display facilities for purposes of open-water training. The purpose of such temporary release would be for implementation of emergency disaster evacuation and contingency plans. Such training can include simple recall and gate training such as teaching the animal to respond to a recall device. It is undisputed that this training could be undertaken

within the facility without NMFS authorization. Neither should NMFS approval be required for training performed outside the facility done for the animal's benefit, and not done for purposes of release.

3. Release of Animals.

Proposed § 216.13(d) prohibits the "release into the wild of a captive marine mammal" except as authorized by NMFS. This provision parallels a virtually identical prohibition promulgated in 1996 as 50 C.F.R. 216.35(e). It is not clear why this prohibition need be repeated a second time.

F. Conclusion.

The Proposed Rule should be withdrawn, rewritten and re-proposed. Many of its provisions have already been specifically reviewed and rejected by Congress. Clearly, these provisions of the Proposed Rule should be deleted. Other parts of the Proposed Rule constitute direct amendments to the MMPA. It is Congress, not NMFS, which has the constitutional authority to amend the law. Such provisions of the Proposed Rule should also be deleted. Still other sections of the Proposed Rule are contrary to the Act. They too should be deleted. The Proposed Rule is comprised of bad policy, impracticable requirements and unnecessary redundancies.

The public display community is fully prepared to work with NMFS and the Congress to develop a workable regulatory proposal. We look forward to having such an opportunity.

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